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Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?

LIST OF INTERESTED PARTIES

Only those parties listed in the caption were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

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CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Northeastern Florida Chapter of the Associated General Contractors of America respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 28, 1992.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 951 F.2d 1217 (11th Cir. 1992), and is reproduced in the Appendix to this petition at App. 1. The district court's judgment and opinion is not reported, but is reproduced in the Appendix to this petition at App. 7.

JURISDICTION

Petitioner brought this action in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and entered its judgment on January 28, 1992. *See* 951 F.2d 1217 and *infra*, p. App. 1.

Petitioner timely filed the instant petition for writ of certiorari in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), *as amended* (1988).

The relevant ordinances are lengthy and, pursuant to Rule 14 of the Rules of this Court, are set out in the appendix at p. App. 14.

STATEMENT OF THE CASE

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1].

The City Minority Business Enterprise ["MBE"] program requires that ten percent of the amount budgeted city contracts be set aside for firms characterized as MBE's. Jacksonville Purchasing Code ["City Code"] § 126.604 (capital improvements contracts), § 126.605 (other contracts); *infra* pp. App. 15-21. The program, as amended, defines a minority business as one owned at least 51% by a minority group member or a woman. City Code § 126.603(a), *infra* p. App. 15. The term "minority group member" refers to a person who is or considers himself or herself to be, black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut, or handicapped. City Code § 126.603(b), *infra* p. App. 15.

The city's chief purchasing officer earmarks contracts

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[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

for bidding by MBE's. The ordinance specifies that the amount of the set-aside, with the Mayor's approval "shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." City Code § 126.604(c), *infra* p. App. 18; § 126.605(c), *infra* p. App. 21.

AGC's members are primarily non-minorities within the meaning of the challenged programs. With the exception of those members who are women, handicapped, or members of one of the defined racial groups, AGC's members are unable to compete for the contracts that are set aside for MBE firms pursuant to the City's program. During the almost five years that the program was in effect, until the district court enjoined its operation, the City contracts awarded to minority businesses on the basis of race, and from which nonminority AGC members have been excluded, amounted to approximately $14,625,000.00.

On the same day as it filed suit, April 4, 1989, AGC moved for a temporary restraining order and a preliminary injunction. On April 6, 1989, the district court entered a temporary restraining order prohibiting future implementation of the challenged MBE ordinance. After a hearing, the district court on April 20, 1989, granted a preliminary injunction.

The City appealed the district court's order, and the Eleventh Circuit Court of Appeals reversed. *Northeastern Fla. Chapter v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). The appellate court did not rule on the issue of standing, although Chief Judge Tjoflat stated in a concurring opinion his view that AGC lacked standing to bring suit. The Eleventh Circuit issued its order on March 2, 1990, and the

mandate issued on April 6, 1990.

During the year between the district court's grant of the preliminary injunction and the Eleventh Circuit's reversal of that injunction, the parties continued to pursue this case. On June 10, 1989, the City filed a motion for judgment on the pleadings, or in the alternative, summary judgment. AGC responded to that motion, and filed a cross-motion for summary judgment on October 20, 1989.

After the Eleventh Circuit issued its opinion in the first appeal, and before trial, the district court on May 31, 1990, granted the plaintiff's motion for summary judgment and denied the defendants' motion. The district court found that the City's program failed to meet the criteria that this Court established in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). After the trial court granted AGC's motion for attorneys' fees, the City appealed once again.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992). The court held that AGC lacked standing because it had not shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.* at 1219; *infra*, p. App. 4.

REASONS FOR GRANTING THE WRIT

In the three years since this Court decided *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), establishing clear guidelines for evaluating race-conscious programs, federal courts have seen a virtual explosion of activity in this area. Unfortunately, some municipalities have attempted to evade, rather than follow, this Court's guidelines. Many plaintiffs attempting to challenge those municipalities have been unable to obtain federal court review because of strict tests for determining standing.

Standing has become a serious issue in affirmative action cases. Of the numerous such cases since *J.A. Croson Co.*, approximately twenty-two have involved minority preferences or set-asides in government contracts. Of those twenty-two cases, fourteen--more than 63%--have addressed the issue of standing. The Eleventh Circuit Court of Appeals, along with at least five other federal courts, has established requirements for standing that make it extremely difficult, if not impossible, for a non-minority contractor to obtain the requisite strict scrutiny of a race-conscious program. Those standards conflict with both the law of other federal courts and the precedent of this Court, whose cases hold that loss of an opportunity to *compete* for contracts is sufficient injury to confer standing.

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS.

An association has standing to bring suit whenever (1) one or more of its members would have standing; (2) the interests it seeks to protect are germane to its purposes; and (3) neither the claim nor the relief requested requires participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In this case, the Eleventh Circuit ruled against AGC only because it found that none of its members would have standing.

To establish standing, an individual plaintiff must allege sufficient facts in its complaint, and produce sufficient evidence in discovery or trial of the case, to show that: (1) he has suffered some actual or threatened injury; (2) fairly traceable to the ordinance; and (3) likely to be redressed by the relief he seeks. *Allen v. Wright*, 468 U.S. 737, 751 (1984). In the instant case, the Eleventh Circuit found that AGC failed to meet the first requirement of concrete, specific injury. *Northeastern Florida Chapter*, 951 F.2d at 1219-20; *infra*, pp. App. 4-5. This holding conflicts with the decisions of other circuit and district courts that have found complaints similar to Petitioner's to be sufficiently specific to establish standing.

A. At Least Seven Federal Courts Have Found That Simply Being Precluded from the Competitive Process Is Sufficient Injury To Create Standing To Sue.

Petitioner AGC filed a verified complaint, alleging *inter alia*, that it is

> a trade association which has membership comprised of, *inter alia*, 240 general contractors, subcontractors, suppliers and associates, many of whom regularly bid on and perform construction work for the City of Jacksonville and Duval County. . . . [S]uch members of Plaintiff AGC are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville or the Duval County School Board.
>
> * * *
>
> Under the Jacksonville MBE program ten percent of the total amount appropriated for capital improvements during the fiscal year is set aside for minority business enterprises.
>
> * * *
>
> The Defendants, acting pursuant to the provisions of the Ordinance 83-1200-647 and Subchapter 13, have set aside construction and procurement contracts and have restricted bidding on and awarding of such contracts to only MBEs.
>
> Numerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants pursuant to Ordinance 83-1200-647 and Subchapter 13.

Plaintiff's Complaint for Declaratory and Injunctive Relief, ¶¶ 9, 19, 45, 46. Defendants challenged none of these allegations, and the district court accepted them as settled. *See, e.g., infra*, p. App. 7-8. Petitioner also placed into the record a copy of the city ordinance that sets aside ten percent of all other city contracts. City Code § 126.605(c); *infra*, p. App. 21.

When, as here, standing must be decided largely on the pleadings,[2] the Court must "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), *quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975). So construed, Petitioner's complaint establishes that its non-minority members, otherwise eligible to compete for contracts with the City of Jacksonville, are excluded solely because of their race from bidding for ten percent of city contracts.

Those facts certainly would be sufficient in the U.S.

[2] Respondents never challenged petitioner's standing until the second appeal of this case, long after the district court had granted summary judgment in petitioner's favor. Because the issue was never raised in the trial court, the record does not contain any evidence of standing beyond the allegations in the verified complaint. Petitioner requested that the Eleventh Circuit, because of the posture of the case, remand it for further evidentiary findings, but the appellate court opted instead to order the case dismissed without prejudice.

Court of Appeals for the Ninth Circuit Court and the United States District Courts for the District of Columbia, Connecticut, and the Northern District of New York. Furthermore, the case law of the Federal Circuit and the U.S. Courts of Appeals for the District of Columbia and Second Circuits indicates that, although those courts have not considered this specific issue, they would find AGC's complaint sufficient to establish its standing.

The earliest of the cases on this issue is *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4 (D. Conn. 1990). The plaintiff trade association challenged an ordinance that set aside a certain percent of public works for minority- and women-owned firms. Although there was no evidence that any association member had lost a specific contract because of the ordinance, the court found that the association had standing. "[T]he set-aside ordinance deprives AGC's white male subcontractor and supplier members of the opportunity to compete for a percentage of the contracts awarded by defendant." *Id.* at 7.

A similar case is *O'Donnell Construction Co. v. District of Columbia*, 762 F.Supp. 354 (D.D.C. 1991). A white-owned contracting company challenged two minority set-aside programs and sought a preliminary injunction. Although the plaintiff identified no specific contract lost due to the programs, it did allege that it had been "excluded from the public contracting opportunities." *Id.* at 362. The court found the complaint sufficient to establish standing to seek a preliminary injunction. "These allegations demonstrate that the injury complained of in this action constitutes the lost opportunity to bid on contracts which are reserved for the

District's MBE program." *Id.*

The most recent case on this issue is *United Fence & Guard Rail Corp. v. Cuomo*, No. 88-CV-306 (N.D.N.Y Oct. 1, 1991) (1991 Westlaw 197675). The plaintiff corporation challenged a state Department of Transportation affirmative action program. The state argued, *inter alia*, that the corporation did not have standing because it failed to show that it had been denied a subcontract because of the program. The district court disagreed, noting that the plaintiff had submitted evidence of its history of bidding for DOT contracts and its intention of continuing to do so. The plaintiff also had evidence of at least one subcontract that it had been denied because of the general contractor's belief that it would not otherwise meet the program's MBE requirements. The court found that evidence sufficient to confer standing. *Id.*

The U.S. Court of Appeals for the Ninth Circuit placed its seal of approval on this principle for determining standing in *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 875 (1992). Once again a construction company challenged a county's minority and women business enterprise program. In the course of holding the ordinance unconstitutional, the court considered the plaintiff's standing to challenge the women-owned business enterprise ["WBE"] preference program. *Id.* at 928. Noting that Coral Construction had not pointed to a specific contract it had lost to a WBE, the court nevertheless held that the company had standing to challenge the ordinance. "As a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but

every time the company simply places a bid." *Id.* at 930. *See also, Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) (association had standing to challenge bid preference ordinance), *pet. cert. filed*, 60 U.S.L.W. 3617 (Feb. 18, 1992).

At least three other circuits, in cases not involving MBE contract set-asides, have held that a change in the opportunity to compete can by itself be sufficient injury to confer standing. In *West Virginia Ass'n of Community Health Centers v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984), the plaintiff association sued the Secretary of Health and Human Services, alleging that the formula the Secretary was using to grant funds unlawfully deprived the State of West Virginia of money to which it was entitled. The federal government argued that the association did not have standing, because it had not shown that if the court mandated in increase in the state's share of the federal funds, any of its members would benefit. The court agreed with the health centers' contention that they had standing because they "have been injured by being denied an opportunity to compete for this increased funding, and that to have standing they need not demonstrate that they would actually receive the additional funding." *Id.* at 1574.

The Federal Circuit followed similar reasoning in *CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983). An unsuccessful bidder on a government contract sought an injunction of the award of the contract, alleging that the federal officials who helped award the contract had a business relationship with the successful bidder that created a conflict of interest. The government argued that the plaintiff,

as an unsuccessful bidder, had no standing to challenge the award of the contract. The court disagreed, noting that the injury that the plaintiff alleged was not the lost contract but "the government's breach of its implied contract to deal fairly with all bidders [which] denied CACI the opportunity to have its bid considered solely on its merits." *Id.* at 1575. With that allegation, the plaintiff had established sufficient injury to have standing to sue.

The Second Circuit followed similar reasoning, although on the flip side of the question, in *National Black Media Coalition v. F.C.C.*, 791 F.2d 1016 (2d Cir. 1986). The plaintiff, a nonprofit organization seeking to promote access by blacks to mass media, sought review of an FCC decision to abandon its minority preference policy. The court found that the organization had statutory standing (thus assuming Article III standing) because the FCC rules would affect the ability of the organization's members to obtain broadcast licenses. *Id.* at 1021. The organization did not, and apparently did not need to, show that any member had actually been refused a license because of the new FCC policy. The change in the rules for competing for the licenses was sufficient injury.

Thus, none of these seven courts would require AGC or any other plaintiff to identify a specific contract lost because of a race-conscious program in order to have standing to challenge that program. The inability to compete for contracts is sufficient injury under the Equal Protection Clause.

B. The Eleventh Circuit Court of Appeals and Five Other Courts Require Identification of Specific Contracts Lost Due to a Race-Conscious Program.

In contrast to the above seven courts stand the Eleventh Circuit and five other federal courts, holding that lost opportunity to compete for a contract is not sufficient injury for standing. Rather, this latter group of courts requires that a plaintiff identify specific contracts that but for the program's restrictions, would have been awarded to the plaintiff.

The Eleventh Circuit's line of cases on this issue began with a trio handed down in 1991 (between the first and second appeals of the instant case)[3]. *See S.J. Groves & Sons Co. v. Fulton Co.*, 920 F.2d 752 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2274 (1991); *Cone Corp. v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 2238 (1991); *Capeletti Brothers, Inc. v. Broward County*, 738 F.Supp. 1415 (S.D. Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2871 (1991). Although the facts in those cases vary, the test for standing is the same -- a mechanical, bright-line requirement that the plaintiff allege a "specific contract lost on account of race." *Northeastern Florida Chapter*, 951 F.2d at 1219.

That strict test has been adopted by the U.S. Courts of Appeals for the Third and Fourth Circuits, and the U.S. District Courts for the Western District of Washington, the Western District of Michigan, and the Northern District of Illinois.

The Fourth Circuit expressed its rule in two decisions. The plaintiff in *Maryland Highways Contractors Ass'n v. State of Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 373 (1991), challenged a state MBE set-aside statute. The court held that the association lacked standing because it had not established injury to any of its members. The plaintiff "admitted that: (1) it had no information concerning any member who may have lost a bid or contract or lost profits as a result of the MBE statute; (2) it had conducted no studies to ascertain whether members had been so injured; and (3) it possessed no documents relating to members' lost profits." *Id.* at 1251.

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[3] The Eleventh Circuit ignored the prevailing law not only on the merits of the standing issue, but also on the procedure to be followed in determining standing. In *Warth v. Seldin*, this Court noted that the trial court has the power to allow a plaintiff to supply evidence supporting standing. "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id.* at 2207. Even the other courts that require evidence of a particular lost contract dismissed the cases before them only after either a trial or hearing on the issue or discovery.

The Eleventh Circuit, by contrast, did not allow any such evidence. The first mention of the standing issue in the instant case was in a concurring opinion in the first appeal, rendered after the record was closed and the parties had filed motions for summary judgment. The law of the Circuit did not change until after the district court had ruled on those motions for summary judgment, but before the second appeal. Despite that posture of the case, and the fact that AGC had had no opportunity to present evidence on the issue, the Eleventh Circuit refused to remand the case. Rather, it ordered the case dismissed without prejudice.

In an earlier, unpublished opinion, the Fourth Circuit dismissed for lack of standing a suit in which a landscaping contractor and his firm challenged a disadvantaged business enterprise ["DBE"] program. *Carpenter v. Barnhart*, 894 F.2d 401 (4th Cir. 1990) (Table) (Text in slip op. No. 88-3578 and Westlaw). The court held that the plaintiffs had failed to show any injury caused by the DBE program. "Carpenter had not even regularly bid on North Carolina highway construction projects since 1983 or 1984, and never identified any specific contracts that were denied him due to the DBE program." *Id.*, Westlaw text p.4. Without such evidence, the plaintiff had no standing to sue.

The Third Circuit approved this evidentiary requirement in *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991). The appellate court approved the district court's decision that several plaintiff associations had standing to challenge a set-aside program for minority, female, and handicapped business enterprises. *Id.* at 1264.

The district court, although holding that four plaintiffs did have standing, decided that five other associations had failed to establish sufficient injury to themselves or their members. The four plaintiffs who did have standing were able to identify projects that, but for the ordinance, they would have been awarded. *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F.Supp. 1274, 1283 n.3 (E.D. Pa. 1990), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991). The other associations either presented no evidence, or only provided affidavits from their members stating that they generally bid on the types of projects covered by the

ordinance. *Id.* at 1284.

Three district court cases have followed the same line of reasoning. *See Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.*, 759 F. Supp. 1498, 1502 (W.D. Wash. 1991) (to have standing, plaintiffs "must allege that they would have bid for and received some or all of the work given by defendants"); *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303, 1310-11 (W.D. Mich. 1991) (association lacked standing where no evidence that members actually bid on reserved projects); *Underground Contractors' Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (N.D. Ill. 1991) (1991 Westlaw 127616) (contractors challenging minority set-aside programs must allege that they were denied contracts for specific projects).

All of these courts have adopted the same formula -- a plaintiff contractor challenging a MBE ordinance must show an economic injury. These courts no longer recognize the type of injuries traditionally involved in equal protection cases, such as the harm inherent in being excluded from a program regardless of whether that program would have been of economic benefit. This formula has the virtue of clarity, but it ignores the prior decisions of this Court.

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT.

The mechanical rule applied to this case by the Eleventh Circuit and approved by other federal courts not only creates a conflict among the courts, but it also contradicts clear decisions by this Court. This Court has determined on numerous occasions that in order to have standing a plaintiff need not prove that he or she would have obtained a job, scholarship, or other benefit. The mere loss of the opportunity to compete creates a cognizable injury under the equal protection clause of the U.S. Constitution.

This Court has on several occasions considered challenges to absolute barriers to participation in government programs. The Court consistently has allowed such challenges, even absent evidence that the plaintiff actually would benefit from participation in the program.

In *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), the plaintiff was a developer that had contracted to purchase a tract of land in order to build racially integrated housing. The developer challenged zoning ordinances that effectively precluded such housing. The defendants challenged the developer's standing to bring suit. *Id.*, 429 U.S. at 260. The Court found that the uncertainty regarding whether the developer would in fact be able to build the housing did not preclude standing in federal court. While the injunction that the developer sought would not guarantee that the company could build the housing, the board's zoning

decision stood

> as an absolute barrier to constructing the housing MHDC [the developer] had contracted to place on the Viatorian site. If MHDC secures the injunctive relief it seeks, that barrier will be removed. . . . MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision."

Village of Arlington Heights, 429 U.S. at 261-62 (citation omitted). *See also*, *Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (intervenors had standing where application of statute would increase likelihood of intervenors' being able to buy affected land); *Orr v. Orr*, 440 U.S. 268 (1979) (male plaintiff had standing to challenge Alabama law requiring husbands, but not wives, to pay alimony); *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive right to the benefits denied to the party discriminated against").

These cases stand for the proposition that an absolute barrier to participation in a government program creates sufficient injury for persons impacted by that barrier. Similarly, when a non-minority contractor faces an absolute bar to receiving a given percentage of public contracts, he or she suffers sufficient injury to have standing to challenge that barrier.

Absolute barriers to participation have special status in equal protection jurisprudence. The essence of the Equal Protection Clause is that all similarly situated persons should have equal opportunity to participate in democratic government, whether or not they all receive equal benefits from that participation. "[D]iscrimination itself by

perpetuating "archaic and stereotypic" notions . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews* at 739-40 (citation omitted).

This Court recognized the importance of equal competition, regardless of the likelihood of success, in *Regents of California v. Bakke*, 438 U.S. 265 (1978). The plaintiff in that case was a white male whose application to a state medical school was rejected. He challenged the legality of the school's special admissions program under which 16 of 100 positions in the class were reserved for minority students, several of whom were admitted with qualifications that were lower than his. Although the issue of standing was not raised in the trial court or court of appeals, several *amici* suggested in their briefs that Bakke lacked standing. *Id.*, 438 U.S. at 281, n.14. They argued that he had not shown that his injury, exclusion from medical school, would be redressed by a favorable decision. The Court stated,

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, *in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.* Hence

> the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Bakke, 438 U.S. at 281, n.14 (citations omitted, emphasis added). *See also*, *Pennell v. City of San Jose*, __ U.S. __, 108 S.Ct. 849, 855 (1988) (plaintiff association had standing where complaint alleged that ordinance would be enforced against members, thereby reducing rent).

When persons are excluded from participation in a government program, then, the issue is not whether they can show that they would have benefitted from participation, but the fact that they were excluded in the first place. Like Bakke, the nonminority AGC contractors have been injured by the City's failure to permit them to compete for all 100% of available City contracts.

In the final analysis, the issue of whether any AGC members lost profits or were otherwise harmed in their business due to the Jacksonville ordinance "is merely one of relief." *Bakke*, 438 U.S. at 281, n.14. The relief that AGC seeks is not damages or recovery of lost profits or any other monetary value. Rather, it simply requests an injunction requiring the City to grant its members equal status in bidding for *all* City contracts, not only some of them.

The injury that AGC alleges is not in the loss of a particular contract, but in the exclusion of non-minority members from full participation in bidding for those contracts in the first place. Any other standard ignores the reality of race-based exclusions and the bidding process for government contracts.

This Court recognized that reality in *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

In that Title VII case, the Court considered the defendant's assertion that a person who had not actually applied for a job could never be awarded seniority as a remedy. The Court disagreed, stating:

> The effects of and *the injuries suffered* from discriminatory employment are not always confined to those who were expressly denied a requested employment opportunity. . . If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-66 (emphasis added).

A contractor faces more than "personal rebuffs" in bidding for a municipal contract reserved for a particular racial group. Preparing bids, particularly for large projects, can be expensive both in terms of time and resources. Bidding for a contract on which a city has placed a label reading "Minorities Only" is not only a futile gesture, but an expensive one.

Requiring that a contractor actually bid for a project, and submit the lowest acceptable bid, also creates a double standard for post-*Croson* cases. Independent contractors are held to a more stringent test than employees or medical school

applicants.

This double standard can be seen clearly in the Fourth Circuit. In *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991), *rev'd*, 956 F.2d 52 (9th Cir. 1992), a Hispanic student challenged a university's scholarship program reserved for black students. The court upheld the program, determining in the course of its decision that the student, who was no longer eligible for a scholarship, had standing. "Denial of an equal opportunity for consideration for a benefit or privilege can give rise to an injury conferring standing. . . . Here, Podberesky unquestionably was denied an equal opportunity to compete for a Banneker scholarship, solely because of his race." *Id.*, 764 F. Supp. at 367-68.

On appeal, the Fourth Circuit held that the program could not withstand equal protection analysis absent evidence of present effects of past discrimination. *Id.*, 956 F.2d 52. Although the court did not address the issue of standing, it had to agree with the district court on that issue in order to reach the merits of the case. Yet this court that allowed a student to challenge a scholarship program for which he was not eligible was the same court that denied contractors standing to challenge a minority set-aside program because they had not identified a contract lost because of the program. *Maryland Highways Contractors Ass'n*, 933 F.2d at 1251.

The Fourth Circuit is only the most obvious example of the disparate tests used to determine standing. *Cf.*, *Jacksonville Branch, NAACP v. Duval Co. School Bd.*, 883 F.2d 945, 953 n.4 (11th Cir. 1989) (association had standing to allege school violated equal protection clause even though no members who testified at trial had children enrolled in

challenged programs). The gulf between the various tests, and between the law of this Court and that of lower courts, can only grow larger as more affirmative action cases arise.

The district court in this case specifically found the Jacksonville, Florida program to be unconstitutional. Yet, because of a stringent mechanical test for standing, applied after two years of proceedings in the trial court and one trip to the appeals court, the program remains in place. Until this Court states whether its rule decided in *Bakke* and other cases applies to *J.A. Croson Co.* and its progeny, unconstitutional race-conscious programs will remain in place in Jacksonville and other municipalities throughout the country.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the instant petition for a writ of certiorari and that this matter be heard by the full Court.

Respectfully submitted,

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April 27, 1992

APPENDIX

Opinion of the Court of Appeals for the
Eleventh Circuit, January 28, 1992 . . . . . App. 1

Order of the District Court,
May 31, 1990 . . . . . App. 7

City of Jacksonville, Florida, Purchasing
Code, §§ 126.601, *et seq.* . . . . . App. 14

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, a Florida Corporation not for profit, Plaintiff-Appellee,

v.

CITY OF JACKSONVILLE, FLORIDA, a Florida Municipal Corp., Tommy Hazouri, in his official capacity as Mayor of the City of Jacksonville, Defendants-Appellants.

No. 90-3495.

United States Court of Appeals, Eleventh Circuit

Jan. 28, 1992.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

The Northeastern Florida Chapter of the Associated General Contractors of America (AGC) sued, challenging Jacksonville, Florida's contract set-aside program for minority business enterprises (MBEs). AGC, an association of individuals and firms in the construction industry who do

business in Jacksonville and are primarily non-minorities for purposes of the set-aside program, filed a 42 U.S.C §§ 1981 and 1983 complaint alleging that the city's program violated the Equal Protection Clause of the Fourteenth Amendment. The city and its mayor were named as defendants. Plaintiff sought declaratory and injunctive relief against enforcement of the ordinance establishing the set-aside program.

The district court granted a preliminary injunction. On appeal this court reversed, holding:

> The present record is inadequate--especially on irreparable injury--to warrant the extraordinary remedy of preliminary injunction.

Northeastern Florida Chapter v. Jacksonville, Florida, 896 F.2d 1283, 1286 (11th Cir. 1990). Chief Judge Tjoflat specially concurred. He agreed with the court that the plaintiff had not made a showing of irreparable injury sufficient to support injunctive relief. But he expressed his view that the decision should have been based on the ground that the plaintiff association lacked standing because it had failed to allege with particularity that its members suffered actual or threatened injury.

Meanwhile the city had filed a motion for judgment on the pleadings or summary judgment, and AGC filed a cross-motion for summary judgment. AGC filed no additional material but relied upon the record that had been presented to this court on appeal. The court granted AGC's motion and entered a permanent injunction on the ground that the city's MBE program suffers from the same constitutional infirmities that the Supreme Court, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), found in

the Richmond, Virginia plan. The court did not address the question of whether the record was sufficient, nor did it address the matter of standing discussed in Chief Judge Tjoflat's special concurrence. The city appeals from this judgment.

The case has now been decided on the merits. We are squarely presented with the issue of standing.[1]

We do not reach the merits of the City's appeal because we find that AGC lacks standing to challenge the ordinance establishing the set-aside program and therefore dismiss the case. In determining whether the court has jurisdiction to entertain AGC's suit, we review the district court's judgment *de novo. Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 607 n. 24 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

Jacksonville enacted Ordinance No. 83-1200-647, codified at §§ 126.601-126.611 of Jacksonville, Fla. Purchasing Code (1984) and entitled "Minority Business Enterprise Participation," which provides for affirmative action in the award of city contracts. The ordinance set aside for award to MBEs ten percent of the amount allocated to city

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[1] We are not barred by law of the case principles. The decision in the first appeal did not rule on standing, either expressly or impliedly. Instead, with notice that Chief Judge Tjoflat would base the decision on that ground, it pretermitted the issue. Moreover, after the decision, principles relating to standing in a similar case were addressed and decided by this court in *Cone Corp. v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, __U.S__, 111 S.Ct 2238, 114 L.Ed.2d 479 (1991).

capital improvement contracts and contracts for goods and services. MBEs awarded contracts pursuant to the ordinance are in turn expected to award 50% of their subcontracting business to MBEs. Jacksonville, Fla. Purchasing Code § 126.607. Section 126.603(a) of the ordinance defines an MBE as a business owned at least 50% by women or members of designated minority groups if the business is privately held and at least 51% so owned if publicly held.

Pursuant to §§ 126.604(b) and 126.605(b), the chief purchasing officer earmarks contracts for bidding by MBEs. Section 126.604(c) dictates, "[t]he [amount of the] set aside and the projects shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." The ordinance establishes a pre-qualification procedure for ascertaining which businesses will have MBE status. *Id.* at § 126.606. The ten percent set aside may be waived by the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the city's cost in meeting the set-aside goals. *Id.* at § 126.608. During the program's five-year tenure, $14,625,000 in contracts was allocated to MBEs on the basis of racial criteria, approximately two percent of the city's total expenditures. There is no evidence as to what percentage of the total capital improvement and other contracts the MBE awards comprised.

AGC as a representative association may have standing to challenge the ordinance only if its members as individuals would have standing to litigate their claims. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343-45, 97 S.Ct. 2434, 2441-42, 53 L.Ed.2d 383 (1977). To

invoke Article III standing, a plaintiff must (1) demonstrate injury of a direct, personal, economic or noneconomic, actual or threatened, real and not hypothetical nature; (2) show injury resulting from defendant's violation of a constitutional or statutory right; and (3) satisfy the court that plaintiff is within the zone of interests intended to be protected by the constitution or statute. Plaintiff must also show that the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472, 475, 102 S.Ct. 752, 758, 760, 70 L.Ed.2d 700 (1982) (citations omitted); *accord Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). When, as here, only declaratory and injunctive relief are sought, plaintiff "must demonstrate that he is likely to suffer future injury." *Cone Corp. v. FLA Dept. of Transp.*, 921 F.2d 1190, 1203 (11th Cir.), *cert. denied*, __U.S.__, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991). Finally, plaintiff must plead standing through "specific, concrete facts." *Id.* at 1204 (citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975).

Plaintiff is unable to demonstrate injury of an economic nature. While over $14,000,000 in contracts was allocated to minority contractors during the set-aside program's five-year tenure, plaintiff has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.) ("question is whether [plaintiff] has alleged a more certain injury than a potential lost bid"), *cert. denied*, __U.S.__, 112 S.Ct. 875, __L.Ed.2d__ (1992). AGC contends that the set-aside program acts as an absolute

bar to non-minority bidding for certain city contracts. While AGC is correct that the city's program operates by designating certain contracts for bidding solely by MBEs, it has not alleged that its members would have bid more successfully on any one or more of these contracts if not for the ordinance. We are barred by the decision in *Cone*, where a challenge by non-minorities to a set-aside program similar in operation to Jacksonville's was rejected for lack of standing because plaintiffs did not allege any specific contract lost on account of race. 921 F.2d at 1205-06; *accord Capeletti Brothers, Inc. et al. v. Broward County*, 738 F.Supp. 1415, 1417 (S.D. Fla. 1990) (plaintiff failed to specify particular project by which it suffered injury), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, __U.S.__, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991). AGC also alleges that it has been forced to discriminate in the award of its subcontracts so as to comply with the ordinance, presumably with a loss of profits. Again it fails to cite any specific subcontracts involved.

Plaintiff has not alleged specific noneconomic harm either. *See U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (holding noneconomic harm satisfies Article III standing requirements).

Since AGC has not demonstrated any injury, we need not consider the other components of Article III standing.

The judgment of the district court is VACATED and the case is REMANDED with the instruction that it be dismissed without prejudice.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NORTHEASTERN FLORIDA CHAPTER
OF THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, etc.
Plaintiff,

v. Case No. 89-278-Civ-J-16

CITY OF JACKSONVILLE, FLORIDA,
etc., et al.,

Defendants.

ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The above-style cause is before the Court on Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment, filed herein on July 10, 1989. Plaintiffs responded to Defendants' said motion on July 21, 1989, and subsequently cross-moved for summary judgment on October 20, 1989.

Procedural History

This action was brought by the Northeastern Florida Chapter of the Associated General Contractors of America (hereafter Northeastern Florida AGC), on April 4, 1989. The plaintiffs were seeking both declaratory and injunctive relief against the defendants' city ordinance that allocates a portion of municipal contracting dollars to businesses owned or controlled by members of minority groups. The ordinance established a "set aside" program whereby ten percent of monies to be used by the City of Jacksonville were to be awarded to Minority Business Enterprises.

On April 6, 1989, the Court issued a Temporary Restraining Order prohibiting the City from further implementing Ordinance Number 83-1200-647, § 126.601-611 of the City of Jacksonville Purchasing Code, and Subchapter 13 of the Rules of Duval County School Board.[1] Subsequently, on April 11, 1989, the Court held a hearing on plaintiff's Motion for Preliminary Injunction and heard argument from counsel of both the plaintiff and defendants. On April 20, 1989, the Court entered its Order granting plaintiff's Motion for Preliminary Injunction and enjoined the Defendants from enforcing or further implementing the ordinance in question.

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[1] The Duval County School Board is no longer a defendant in this case as a result of their voluntary discontinuance of awarding funds under their Subchapter 13 MBE program.

On May 12, 1989, the Defendant CITY and MAYOR appealed this Court's Order. By opinion dated March 2, 1990, the United States Court of Appeals for the Eleventh Circuit found that there was no necessity for the issuance of a preliminary injunction, reversed said issuance and remanded the case to this Court for an expedited trial or other disposition on the merits. Northeastern Florida Chapter v. Jacksonville, Fla., No. 89-3410, slip op. 2151 (11th Cir.) (Edmondson, J.)

Ordinance at Issue

The stated purpose of Ordinance 83-1200-647 is set out in § 126.601 which states that:

> (a) past inequities and disparities have disadvantaged minority business enterprises in the awarding of contracts by the City, and these minority business enterprises have been disadvantaged in their participation in the general welfare of the City and in City expenditures for services, supplies and materials.
>
> (b) the provisions of this Part 6 constitute a reasonable and necessary means, in the exercise by the City of its powers to make expenditures and to provide for the general welfare, to remedy such disadvantaged participation.

(Ordinance 83-1200-647 was eventually incorporated within § 126.601, *et seq.* of the City of Jacksonville Purchasing Code.) Under § 126-603(a), an MBE is defined as:

> ...a commercial or industrial enterprise, at least fifty percent of which is owned by minority group members or by women or, in the case of a publicly-owned

enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women.

Section 126-603(b) defines minorities to include blacks, Spanish-speaking Americans, Orientals, Indians, Eskimos, Aleuts and those handicapped.

Plaintiff's Case

The plaintiff, NORTHEASTERN FLORIDA AGC, is an association of persons and firms in the construction industry, who do business in Jacksonville. Northeastern Florida AGC's members are primarily, but not exclusively, non-minorities within the meaning of the MBE program. With the exception of those members who are women, handicapped or are a member of one of the defined groups in §126.603(b), Plaintiff's members are unable to compete for the contracts which are set aside for MBE firms in accordance with Defendants' program.

Plaintiff alleges that the City MBE program violates the Fourteenth Amendment of the United States Constitution; violates 42 U.S.C. § 1981 and, denies rights both protected by and enforceable under 42 U.S.C. § 1983.

Analysis

The United States Supreme Court has established the criteria which this Court must apply to evaluate the constitutionality of a local government's use of racial motivation in the awarding of public contracts. City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct. 706 (1989).

The Supreme Court held that the use of racial criteria by a local government must be tested under the strict scrutiny standard of review. Any use of remedial racial preferences must be justified by a compelling state interest and must be narrowly tailored to achieve the remedial objective. The Croson decision was the first case in which strict scrutiny became the standard by which the constitutionality of awarding racially motivated public contracts by local government is tested.

The legislative body must have strong and specific evidence and "findings" of identifiable past racial discrimination and of present effects of such discrimination to establish a compelling government interest in applying race motivated criteria in enacting laws. Croson, 109 S.Ct. at 724. The mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. *Id.* at 724, citing to Weinberger v. Wiesenfeld, 420 U.S. at 648, n.16, 95 S.Ct., at 1233, n.16. Racial classifications are suspect and that means that simple legislative assurances of good intention cannot suffice. *Id.* at 724. There must, as a matter of law, be a "strong basis in evidence for its (the legislature's) conclusion that remedial action was necessary." *Id.* at 724, quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) (plurality opinion).

The MBE program of the City of Jacksonville suffers from the same constitutional infirmities that the Supreme Court found in the City of Richmond plan. There is not doubt that the Jacksonville plan relied heavily on what the Supreme Court has termed "societal discrimination." Unfortunately for the Defendants, however, such a basis is simply insufficient to rely

on to enact legislation utilizing racial preferences in the award of public contracts. Wygant at 274. In fact, in Defendants' Motion for Judgment on the Pleadings, it is readily admitted (as it is in Defendants' Answer) that the City had conducted no formal study prior to enacting the challenged ordinance. See Defendants' Motion, page 2, ¶3. This certainly flies squarely in the face of the "contemporaneous findings" requirement of Croson:

> While the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race conscious relief.

Croson, 109 S.Ct. at 727.

As Chief Justice Burger stated in Fullilove v. Klutznick, 448 U.S. 448, 491 (1980), "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." By the Defendants' own admissions, they simply did not have necessary factual findings before them to justify the enactment of a racially motivated ordinance. (The Court today need not reach the second strict scrutiny prong as to whether or not the ordinance was "narrowly tailored".)

Just as the Eleventh Circuit noted that it "too question(s) the ordinance's constitutionality," Northeastern Florida Chapter v. Jacksonville, Fla., No.89-3410, slip op. at 2152, and doubted "whether the Jacksonville set-aside program can survive the strict scrutiny required by the Supreme Court," *id.* at 2154, this Court today declares Jacksonville Ordinance

Number 83-1200-647 incorporated within § 126.601, *et seq.*, of the City's Purchasing Code facially unconstitutional. This ordinance fails to comport, as a matter of law, with the constitutional mandates enumerated by the United States Supreme Court in Croson.

Accordingly, it is now

ORDERED AND ADJUDGED:

The Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment, be and the same is hereby DENIED, and that Plaintiffs Motion for Summary Judgment be and the same is hereby GRANTED. The Defendants are hereby enjoined from enforcing the provisions of Ordinance Number 83-1200-647, § 126.601-611, of the City of Jacksonville Purchasing Code, without prejudice to the Defendants to enact legislation it so deems advisable, and, complies with the constitutional mandates of Croson and Fullilove.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 31 day of May, 1990.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Ordinance No. 83-1200-647,
as amended by Ordinance No. 88-37-143

CITY OF JACKSONVILLE PURCHASING CODE

Part 6. Minority Business Enterprise Participation

126.601 Legislative findings. The Council finds and determines that:

(a) past inequities and disparities have disadvantaged minority business enterprises in the awarding of contracts by the City, and these minority business enterprises have been disadvantaged in their participation in the general welfare of the City and in City expenditures for services, supplies and materials.

(b) the provisions of this Part 6 constitute a reasonable and necessary means, in the exercise by the City of its powers to make expenditures and to provide for the general welfare, to remedy such disadvantaged participation.

126.602 Applicability. This part shall apply only to using agencies that are City agencies and shall not apply to the independent agencies. This part shall apply to all contracts funded in whole or in part by city funds, regardless of the source or sources of other funds; provided, that there shall be exempt from the requirements of this part any contract with respect to which a requirement for minority business enterprise participation is imposed by State or federal law.

126.603 Definitions. For purposes of this part, unless the context otherwise requires:

(a) Minority business enterprise means a commercial or industrial enterprise, at lease fifty-one percent of which is owned, operated and controlled by minority group members or by women or, in the case of a publicly-owned enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women.

(b) minority group member means a person who is, or considers herself or himself to be, in one of the following classes:

(1) black.
(2) Spanish-speaking American.
(3) Oriental.
(4) Indian.
(5) Eskimo.
(6) Aleut.
(7) handicapped.

(c) the terms *black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut* and *handicapped* have the meanings given to them by the Equal Employment Opportunity Commission in its rules defining and describing these terms.

126.604 Minority business enterprises: capital improvements contracts.

(a) With respect to the capital improvements contracts to be awarded during each fiscal year, there shall be set aside for minority business enterprise during the fiscal year an amount equal to ten percent of the total amount appropriated

for capital improvements (including projects to be constructed pursuant to the road program under Chapter 748) in the budget ordinance, or in any ordinance or resolution approving the issuance of bonds for capital improvement projects adjusted as follows:

(1) There shall be deducted from the total amount (before the reservation of the ten percent), the amounts listed in the budget ordinance for projects which are being carried forward under s. 106.309, except as provided in paragraph (3) for additional appropriations during the fiscal year.

(2) There shall be deducted from the total amount (before the reservation of the ten percent), the total amount listed in the budget ordinance for projects which are to be constructed by City forces.

(3) There shall be added to this ten percent set aside for minority business enterprises, an amount equal to ten percent of the appropriations during the fiscal year for capital improvements, whether as new projects or as additional appropriations for current projects. This paragraph shall not require that a project be subdivided solely in order that part of the project will be included in the set aside.

(4) Mathematical certainty is not required in determining the amount of the set aside; but the Chief Purchasing Officer shall make every attempt to come as close as possible to the ten percent figure. To the extent that less than ten percent can be set aside under the provisions of this subsection [considering the capital improvements contracts which it is possible to award under subsection (b)], the amount that cannot be set aside shall not be considered to be subject to

this part, and award of contracts can be made pursuant to Part 2 without regard to this part.

(b) As soon as the budget ordinance is enacted, the Chief Purchasing Officer, in consultation with the Director of Public Works and a designated representative of each division of the departments of the Consolidated Government (hereinafter called Division) funded for capital improvement projects, shall ascertain the amount of the capital improvements to be set aside under subsection (a) and the capital improvements contract which will be awarded out of this amount. When this amount is adjusted in accordance with paragraph (3) of subsection (a), the set aside will be reviewed and additional capital improvement projects will be included as necessary. Each Division funded for capital improvement projects shall report any changes to the Chief Purchasing Officer on a quarterly basis. In determining the projects which will be constructed under contracts awarded to minority business enterprise:

(1) the Chief Purchasing Officer shall endeavor to include projects representative of the total number of projects which will be constructed or undertaken and the types of trades which will be utilized during the fiscal year.

(2) a project shall be included in its entirety and shall not be subdivided solely in order to allow part of the project to be included in set aside, except where approved by the Mayor.

(3) mathematical certainty is not required in determining the capital improvements contracts which will be awarded out of this amount; but the Chief Purchasing Officer

shall make every attempt to utilize the entire amount set aside under this part.

(c) The amount of the set aside and the projects which it is proposed will be constructed out of the set aside shall be presented to the Mayor for his approval. Upon approval by the Mayor, the set aside and the projects shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises. Changes in the set aside or in the projects shall likewise be subject to approval by the Mayor. No contracts awarded to a contractor under the provisions of Part 2, without consideration of this part may be considered in whole or in part as a project awarded directly to minority business enterprise under this part, except when approved by the Mayor.

126.605 ____: other contracts.

(a) With respect to contracts for other than capital improvements to be awarded during each fiscal year, there shall be set aside for minority business enterprises during the fiscal year an amount equal to ten percent of the estimated amount to be expended for these contracts during the fiscal year, as follows:

(1) The set aside shall be classified in three classes:

(i) contracts for supplies;

(ii) contracts for contractual services (other than professional services); and

(iii) contracts for professional services.

(2) The ten percent requirement shall apply to the total estimated amount to be expended for all contracts during the fiscal year, but it shall be divided among the three classes in the same proportion as the total estimated amount for each class bears to the total estimated amounts for all classes together.

(3) There shall be added to this ten percent set aside for minority business enterprises, an amount equal to ten percent of the appropriations or transfers during the fiscal year for these contracts, whether as new contracts or as additional appropriations or transfers for current contracts. This paragraph shall not require that a contract be subdivided solely in order that part of the contract will be included in the set aside.

(4) Mathematical certainty is not required in determining the amount of the set aside; but the Chief Purchasing Officer shall make every attempt to come as close as possible to the ten-percent figure. To the extent that less than ten percent can be set aside under the provisions of this subsection [considering the contracts which it is possible to award under subsection (b)], the amount that cannot be set aside shall not be considered to be subject to this part, and awards of contracts can be made pursuant to Part 2 or Part 3

without regard to this part.

(b) As soon as the budget ordinance is enacted, the Chief Purchasing Officer, in consultation with a designated representative of each Division, shall ascertain the amount of the funds to be set aside under subsection (a), by each of the classes described in subsection (a)(1). When this amount is adjusted in accordance with paragraph (3) of subsection (a), the set aside will be reviewed and additional amounts will be included as necessary. When budgeted figures reported are changed during the course of the fiscal year, the designated Division representative shall report such changes to the Chief Purchasing Officer on a quarterly basis. In determining the contract which will be awarded to minority business enterprises under the section:

(1) the Chief Purchasing Officer shall prescribe by rule the method by which contracts in each of the classes described in subsection (a)(1) will be selected for award to minority business enterprises.

(2) A requirement for supplies, contractual services or professional services shall be included in its entirety and shall not be subdivided solely in order to allow part of the contract to be awarded in the set aside, except where approved by the Mayor.

(3) mathematical certainty is not required in determining the contracts which will be awarded out of this amount; but the Chief Purchasing Officer shall make every attempt to utilize the entire amount set aside under this part.

(c) The amount of the set aside shall be presented to the Mayor for his approval, by each of the classes described in subsection (a)(1). Upon approval by the Mayor, the set aside shall be deemed reserved for minority business enterprises only, and contracts shall be awarded directly to minority business enterprises. Changes in the set aside shall likewise be subject to approval by the Mayor. No contract awarded under the provisions of Part 2 or Part 3, without consideration of this part, may be considered in whole or in part as a contract awarded directly to minority business enterprises under this part, except where approved by the Mayor.

(d) For the purpose of determining whether the ten-percent set aside under this section has been met, the Chief Purchasing Officer shall average the amount set aside under this section over a period of two fiscal years. If the amount set aside in the first fiscal year of the period is:

(1) less than ten percent, the percentage by which this amount fails to reach ten percent shall be added to ten percent, and this aggregate percentage shall be required to be set aside during the second fiscal year of the period.

(2) more than ten percent, the percentage by which this amount exceeds ten percent shall be subtracted from ten percent, and the diminished percentage only shall be required to be set aside during the second fiscal year of the period.

A reduction made pursuant to s. 126.608 shall not affect this section.

126.606 Prequalification of minority business enterprises.

(a) In order that minority business enterprises will be able to participate in the program established by this part in a meaningful fashion, a prequalification procedure will be instituted by the Purchasing Division under rules promulgated by the Chief Purchasing Officer and approved by the Awards Committee or Evaluation Committee, as the case may be, and by the Director. This procedure shall apply to minority business enterprises seeking to be awarded contracts under s. 126.604; it may be extended to the minority business enterprises seeking awards of contracts under s. 126.605 if, in the opinion of the Chief Purchasing Officer, this is necessary in order that the minority business enterprises will more effectively be able to bid on these contracts.

(b) The prequalification procedure shall be open to any minority business enterprise that deems itself qualified to bid on and perform the type or types of contracts for which the prequalification procedure is designed. The prequalification procedure shall be fair and equitable and shall fairly ascertain the qualifications of the minority business enterprises included on it to bid on and perform the type or types of contracts for which the prequalification procedure is designed. The Chief Purchasing Officer shall make the initial determination as to the prequalification of a minority business enterprise and whether it shall be admitted to the list of prequalified bidders. A minority business enterprise that is denied prequalification shall have the right to appeal the denial to the Awards Committee or Evaluation Committee, as the case may be; the decision of the Committee shall be final. Prequalification

under this subsection shall not preclude a minority business enterprise from being included on the bidders' list provided for in s 126.106(m) for other supplies and services.

126.607. Subcontractors. A minority business enterprise that is awarded a contract under this part shall make every endeavor to expend as much of the contract as possible for minority business enterprise as subcontractors. At least fifty percent of the contract value of all subcontracts shall be required to be set aside for minority business enterprise subcontractors unless a greater or lesser percentage is specified in the invitation to bid or request for proposal. The Minority Business Coordinator of the City of Jacksonville and the Chief Purchasing Officer jointly may waive this requirement of fifty percent value set aside when minority business enterprise subcontractors are not available in the particular specialty, area or field involved in the set aside, or if more than fifty percent of the total contract has been contracted with minority business enterprises. All waivers granted shall be presented to the Mayor. A minority business enterprise contractor that consistently refuses to award subcontractors to minority business enterprise subcontractors may be barred by the Chief Purchasing Officer, pursuant to rules promulgated by him, from further participation in the minority business enterprise participation program under this part; a debarring by the Chief Purchasing Officer may be appealed to the Awards Committee or Evaluation Committee, as the case may be, whose decisions shall be final.

126.608. Waiver or reduction of percentage set aside in certain cases. The Chief Purchasing Officer may waive the percentage set aside under s. 126.604 or s. 126.605 or reduce the percentage to a definite amount less than the ten percent amount, based upon consideration of the following factors:

(a) the total dollar amount of the proposed set aside.

(b) the extent to which the type or types of contracts involved may be reasonably susceptible to separate contracting of portions of work, services, goods, supplies and the like.

(c) the particular type or types of work, services, goods, supplies and the like which are involved in the set aside.

(d) the availability of minority business enterprises in the particular contracting specialties, areas or fields involved in the set aside.

(e) the additional cost to the City of securing the specified percentage of minority business enterprise participation.

The determination by the Chief Purchasing Officer to waive or reduce the percentage of minority business enterprise participation shall be subject to review and approved by the Awards Committee or Evaluation Committee and shall become final only upon approval by the Mayor.

If a project is waived under the provisions of this part, the Chief Purchasing Officer may include the total amount of such waiver in reducing the set aside goal in the area of procurements covered by Sections 126.604 and 126.605.

126.609 Termination of contract awarded under s. 126.604 or s. 126.605. In addition to other methods provided by law for termination of contracts, a contract resulting from an award of contract under s. 126.604 or s. 126.605 may be terminated by the Chief Purchasing Officer upon:

(a) a determination by the Chief Purchasing Officer:

(1) that the contractor is not a qualified minority business enterprise as certified in the bid or proposal submitted by the contractor and upon the basis of which the contract was awarded,

(2) which is reviewed and approved by the Awards Committee or Evaluation Committee after giving notice and opportunity for a hearing to the contractor, and

(3) which is subsequently approved by the Mayor; and--

(b) thereafter by his giving not less than ten days advance written notice of the intended termination, exclusive of the date of termination, to the contractor by certified mail to the address indicated in the bid or proposal.

126.610 Quarterly reports by Chief Purchasing Officer to Mayor. Quarterly, the Chief Purchasing Officer shall report to the Mayor on the administration and operation of this part, specifically with reference to:

(a) the amount set aside under ss. 126.604 and 126.605, with appropriate adjustments as required by those sections and as permitted under s. 126.608.

(b) the number of contracts awarded to minority business enterprises under each section.

(c) whether the percentage amounts required by those sections are being met and whether a carryover may be necessary under s. 126.605(d).

(d) the use of minority business enterprise subcontractors under the requirements of s. 126.607, and whether any minority business enterprise contractors have been debarred under that section.

126.611 Other provisions of Purchasing Code to apply. Except as provided in this part to afford minority business enterprises easier access to the City contracting process, the provisions of Parts 1, 2, 3 or 4 apply. The rules of the Purchasing Division shall specify the manner in which conflicts between the provisions of Parts 1, 2, 3 or 4 and this part are to be resolved.

126.612. Policies and procedures for implementation of set aside program. The Chief Purchasing Officer and the Minority Business Coordinator shall prepare for approval by the Mayor policies and procedures regarding implementation of the set aside program. These policies and procedures, after approval by the Mayor, shall be applied in their entirety by the Chief Purchasing Officer and the Minority Business Coordinator in the operation of the set aside program.

126.613 Length of participation; repeal; saving clause. The minority business enterprise participation created by this part shall remain in effect for five (5) years from October 1, 1988. Thereafter, this part and the minority business enterprise participation established hereby shall

terminate and shall be repealed and of no further force and effect and all references throughout this Chapter to this part and to the minority business enterprise participation as a separate part of the Purchasing Code shall be removed and deleted. At such time the Council may re-enact this ordinance if the disparity in minority business enterprise participation has not been remedied.

Section 2. If any section, subsection, sentence, clause, or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 3. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.